



OFFICE of *the* ATTORNEY GENERAL
GREG ABBOTT

December 12, 2002

Ms. Carol Longoria
Office of General Counsel
University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

OR2002-7072

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173555.

The University of Texas at Austin (the "university") received a request for three categories of information pertaining to a request for proposals for a steam turbine generator with surface condenser.¹ More specifically, the requestor seeks 1) the final evaluated price, as calculated by the formula outlined on pages 36 and 37 in the specification, for each of the bidders; 2) data submitted by each of the vendors as required in pages 29 through 38 of the specifications; and 3) exceptions taken by each bidder to the requirements of the bid inquiry documents. You state that the university takes no position with respect to the request but, pursuant to section 552.305, notified the entities whose proprietary interests may be

¹Based on information submitted to this office by both the university and Siemens Westinghouse, it appears that the university in fact received two requests for information pertaining to the request for proposals at issue. The university, however, has submitted a request for a ruling to this office in response only to the request submitted to the university by General Electric International, Inc. Therefore, this ruling is limited to the information submitted to this office by the university as responsive to the request from General Electric International, Inc. See Gov't Code § 552.301(a), .306.

implicated of the request.² You state that Siemens Westinghouse ("Siemens") objected to the release of their information, while the other entity at issue, Dresser-Rand, had no objections. The university therefore released the responsive information pertaining to Dresser-Rand to the requestor. Siemens timely briefed this office and contends that information responsive to categories two and three of the request is excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code.³

First, we must address a procedural matter. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You acknowledge that the university failed to request a decision within the ten business-day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). In this instance, because the request implicates a third party's interests, we will address Siemens' arguments.

²See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

³Siemens states that it has no objection to release of the "final evaluated price" as requested in category one of the request, to the extent that such information consists only of a specific number and not any underlying data which may have been used to determine such a price.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the university does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴ This office has held that if a governmental body takes no position with

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

After reviewing the information at issue and the arguments set forth by Siemens, we find that Siemens has not established that the information it seeks to withhold is protected as a trade secret under section 552.110(a). However, we conclude that Siemens has demonstrated how release of a portion of the information you have submitted as Tab 5 from Siemens' proposal would cause substantial competitive harm to Siemens. Therefore, this information, which we have marked, must be withheld from disclosure under section 552.110(b). The remainder of the information in Tab 5 must be released to the requestor. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors); 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process); 184 (1978).

Finally, we note that Siemens makes arguments to withhold certain information it has submitted as Exhibit 3 that it states is responsive to category three of the request. The university, however, did not submit this information to our office for review. Therefore, this ruling does not address the information Siemens submitted to this office as Exhibit 3, and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

To summarize, the university must withhold the information in Tab 5 that we have marked under section 552.110(b). The remainder of the information in Tab 5 must be released to the requestor.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 173555

Enc. Submitted documents

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